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No. 04-1144

IN THE

Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the First Circuit apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

2. Whether the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003), preserves the health and life of the minor through the Act's judicial bypass mechanism and/or other state statutes.

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INTEREST OF *AMICUS CURIAE* [1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF is a pro-family group that has long advocated judicial restraint and fidelity to the text of the U.S. Constitution. In the abortion context, Eagle Forum ELDF opposes overreaching by federal courts in reviewing

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

laws passed by state legislatures that provide for parental and informed consent in connection with abortion. Eagle Forum ELDF has a strong interest in ensuring adherence by federal courts to their limited role set forth in the Constitution, and submits this brief in support of limiting federal judicial review of state abortion statutes to the standard promulgated by this Court in reviewing other regulations of conduct.

SUMMARY OF ARGUMENT

It is axiomatic that federal jurisdiction is limited to actual cases and controversies, as set forth in Article III of the U.S. Constitution. Federal courts are not mini-legislatures, empowered to exercise veto power over statutes duly enacted by Congress or state legislatures. This Court articulated the widely followed standard for federal judicial review of legislation: a facial challenge can succeed only if there are no circumstances in which the legislation may be applied constitutionally. *United States v. Salerno*, 481 U.S. 739, 745 (1987). That precedent represents an essential expression of limits on judicial power with respect to legislation. Courts are tribunals for adjudicating facts, not second-guessing legislation in a factual vacuum.

The existence of a large and politically powerful abortion industry in our Nation does not justify contradicting *Salerno*. Quite the contrary, abortion presents a compelling need to develop a factual record of application of a statute prior to passing judgment on it in a court. Judges are skilled in law but lack medical training, and they are particularly unsuited to sift medical fact from fiction in the absence of an actual implementation of a parental notification law. If the effects of the New Hampshire legislation are as dreadful as Respondents claim, then they would have no trouble presenting a court with an unconstitutional implementation to litigate their claims.

The court below erred in ignoring the harmful health effects of abortion, and therefore the need to notify parents of unemancipated minors prior to performing it. Growing recognition of the tragic causation by abortion of breast cancer and premature births reinforces the legitimacy of state laws requiring parental or informed consent for minors having abortion. Just as the deadly harms of smoking were kept quiet for decades, the fatal physical effects of abortion are rarely disclosed to the subjects of an abortion. States have a substantial interest, even a compelling one, to ensure that minors considering an abortion hear from mature voices other than the abortionists who stand to profit from the procedure. If health of the minor were the real concern, then all would favor parental notification so that the family health history of the patient may be fully considered. If the mother of the minor herself had breast cancer—a fact of which the minor might not be aware—then performing the abortion could increase the daughter's chance of breast cancer to a near certainty. "At best, [a teenager's abortion] will give her a 30% risk of breast cancer in her lifetime. At worst, if she also has a family history of breast cancer, it will nearly guarantee this." So observed breast surgeon Angela Lanfranchi, M.D., F.A.C.S., in her statement to the press at the Population Research Institute Conference, in Santa Clara, California (April 5, 2002).[2] Moreover, if the minor is considering having a family in her future—again a consideration best discussed with her parents—then having an abortion greatly increases the chance of a debilitating premature birth and attendant injuries such as cerebral palsy. *See* Point III, *infra*.

The New Hampshire statute at issue can plainly be applied in a constitutional manner for the valid and commendable purpose of allowing minors to be fully informed with the wisdom of their parents, including medical considerations,

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[2] http://www.aapsonline.org/lanfranchi.htm (viewed Aug. 2, 2005).

prior to agreeing to have the life-changing operation of abortion. It is legally and medically unsound for federal courts to violate the *Salerno* standard and strike down legislation in a factual darkness.

ARGUMENT

I. THE U.S. CONSTITUTION AND *SALERNO* REQUIRE REVERSAL OF THE FACIAL INVALIDATION OF THE NEW HAMPSHIRE ABORTION STATUTE.

The facial invalidation of statutes permitting constitutional implementation violates the "case or controversy" requirement for adjudication. U.S. CONST. Art. III, § 2. "[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard*, 321 U.S. 288, 310 (1944). To hold otherwise "would enable the courts . . . 'to assume a position of authority over the governmental acts of another and co-equal department.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

The federal judiciary does not sit as a supra-legislature over the actions of the States. A plaintiff such as Respondent Planned Parenthood of Northern New England cannot base its litigation on pure speculation that someone might someday suffer an unconstitutional injury due to a statute that has never been enforced. Courts are not venues for Platonic discussions about what might or might not occur. An actual case or controversy is required to establish Article III jurisdiction, and there is no exception carved out of Article III especially for abortion providers. *Salerno* requires implementation of the statute, regardless of whether a right is asserted under *Roe v. Wade*, 410 U.S. 113 (1973).

In *Salerno*, this Court upheld the Bail Reform Act because "[t]he fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745. Under this standard, the never-enforced New Hampshire parental notification law must be upheld. There is no evidence that it would be applied in an unconstitutional manner, and it has an obvious justification in safeguarding minors. The pure speculation offered for how the statute might be applied unconstitutionally is conjecture and nothing more.

Despite the clear holding of *Salerno*, none of the plurality opinions in *Casey* so much as acknowledged its existence, perhaps reflecting an unwillingness to depart from *Salerno*. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (not one of the five Justices affirming *Roe v. Wade* even mentioning the *Salerno* test, despite its reference by the four Justices who agreed *Roe* should be overruled). Previous to *Casey*, this Court repeatedly cited *Salerno* in abortion cases. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring). The *Salerno* test has since been widely and successfully applied elsewhere, even by the same appellate court below in denying a facial challenge to restrictions on sidewalk counselors advising against abortion. *See McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 1827 (2005). Only in the field of abortion law, and only in favor of abortion, does this Court use the "undue burden" test outside of the First Amendment context. This unexplained deviation by *Casey* is unjustified and should be overturned.

The practice of abortion is a far cry from the right of free speech that is essential to self-government, and thus de-

serving of an "undue burden" standard. In *Schneider v. New Jersey* 308 U.S. 147 (1939), this Court held that "the freedom of speech and that of the press [are] fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." *Id.* at 161. Because of this fundamental importance to the functioning of a democratic society, First Amendment challenges to laws are judged under an "undue burden" standard to prevent an atmosphere of self-censorship caused by overly broad statutes. According to this Court, allowing a litigant to utilize this standard "is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

In sharp contrast, abortion is not a right of expression, nor is it fundamental to the functioning of a free government under the *Schneider* interpretation. No one, regardless of his position on abortion, can regard it as fundamental to the successful functioning of a democracy. The fact that this Court has not extended the "undue burden" standard to cases involving the important rights of the Fifth and Eighth Amendments (to use the issue in *Salerno* as an example) supports this view of the First Amendment's unique position.

This Court should end the conflict between the *Salerno* and *Casey* decisions in favor of the *Salerno* holding. The Fourth and Fifth Circuits have properly continued to apply *Salerno*, as it has not been overturned. In *Barnes v. Moore,* the Fifth Circuit upheld the use of *Salerno* on precedential grounds: "we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes." 970 F.2d 12, 14 n.2 (5th Cir.), *cert. denied*, 506 U.S. 1013 (1992). The Fourth

Circuit held likewise. "We begin by emphasizing... that the challenge to [the abortion clinic regulation] is a facial one and therefore 'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act 'would be valid.'" *Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health & Envtl. Control*, 317 F.3d 357, 362 (4th Cir. 2002), *cert. denied,* 538 U.S. 1008 (2003) (quoting *Salerno*, 481 U.S. at 745). *See also Okpalobi v. Foster*, 244 F.3d 405, 427 n.35 (5th Cir. 2001); *Manning v. Hunt*, 119 F.3d 254, 268-69 (4th Cir. 1997). It is therefore essential that this Court end the confusion by clearly, definitively, and explicitly upholding the *Salerno* test over the *Casey* contradiction.

The other part of the *Casey* test, the "large fraction" standard, should similarly be rejected due to its overly subjective nature. 505 U.S. at 895 (plurality decision). It is noteworthy that, although only a tiny percentage of minors have severe health problems, many federal courts invariably find that the *Casey* threshold had been crossed to trigger the "undue burden" test based on such rarely occurring and speculative illnesses. Proponents of judicial interference with state regulations of abortion fail to cite definite health risks of abortion beyond a vague and unsubstantiated comparison of risk between abortion and childbirth. Courts are left in the dark about the many grave, long-term health dangers associated with abortion. *See* Point III, *infra*. The lack of real evidence showing a health need for abortion renders lower courts' finding of a "large fraction" absurd.

Moreover, the arbitrary "large fraction" test is unprincipled. Is 1% of a particular group a constitutionally acceptable fraction, but 10% unconstitutional? Such hair-splitting is best left out of the Judiciary's purview. Either a law is repugnant on its face to the Constitution, or it is presumptively constitutional until applied in an unconstitutional manner. Because the "undue burden" test is misapplied

outside the First Amendment context, and the "large fraction" test is vague and subjective, the Court should clarify that the *Salerno* standard of constitutionality applies to the business of abortion just as it applies to every other type of commercial conduct. *See Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1006 (2004) (Roberts, J., dissenting) (noting that "a facial challenge can succeed only if there are no circumstances in which the Act at issue can be applied without violating the" Constitution).

II. JUDICIAL RESTRAINT IS PARTICULARLY APPROPRIATE IN REVIEWING LEGISLATION ENSURING PARENTAL NOTIFICATION FOR MEDICAL PROCEDURES.

"Courts are ill-equipped to evaluate the relative worth of particular surgical procedures," Justice Kennedy has observed. *Carhart v. Stenberg*, 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting). The reasoning behind that statement is beyond dispute. "The legislatures of the several States have superior factfinding capabilities in this regard." *Id.* Justice Kennedy noted that this "general rule extends to abortion cases," quoting Justice O'Connor for the proposition that "the Court is not suited to be 'the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.'" *Id.* (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting, internal quotation marks omitted)).

The need for judicial restraint in favor of legislatures is even more compelling when the issue concerns parental notification so that minors can give mature and informed consent to a procedure. A minor is often in no position to know her family's medical history and how an abortion may increase her chance for serious medical problems, as

discussed in Point III, *infra*. A court is ill-equipped to decide what type of notification and consent is appropriate for a minor considering to undergo a life-threatening operation. "'Irrespective of the difficulty of the task, legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts.'" *Carhart*, 530 U.S. at 968 (Kennedy, J., dissenting, quoting *City of Akron*, 462 U.S. at 456, n. 4).

Federal courts are not family courts, and are even less experienced in the advantages and disadvantages of medical operations for a member of one's family. Where "it is difficult to conceive of an area of governmental activity in which the courts have less competence," this Court has emphasized the need for deference and judicial restraint. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (deferring to military). As little as the experience of federal courts is in military matters, it is markedly less in family or medical issues. Federal judges do often have personal experience in the military, but almost none has any medical training or experience with parental notification requirements.

In contrast, legislatures often include many experienced physicians (the Majority Leader of the U.S. Senate is a surgeon), and, more importantly, the legislative process can benefit from a wide range of medical input and related factfinding along with full participation by the public. In sharp contrast, judicial proceedings are confined to a few handpicked "experts" paid for their time in delivering an expected opinion. There is little public scrutiny of what they say and deliberation is limited to a single person untrained in medicine rather than a group of legislators who can draw upon medically experienced staffs and constituents. If courts are poor venues for deciding military issues, then they are even less suited to invalidate statutory consent requirements for minors concerning a controversial procedure. The highest level of judicial restraint is warranted here.

Judicial invalidation by a court of an abortion law "on its face," without even development of a factual record for implementation of the statute, is particularly unwarranted. Courts, already unsuited for rendering legislative decisions, are less equipped for deciding medical notification requirements in the absence of a factual record of implementation.

In *Carhart*, one federal court struck down a law used by 31 states without benefiting from a factual record of any implementation of any of the statutes:

> The United States District Court in this case leaped to prevent the law from being enforced, granting an injunction before it was applied or interpreted by Nebraska. In so doing, the court excluded from the abortion debate not just the Nebraska legislative branch but the State's executive and judiciary as well. The law was enjoined before the chief law enforcement officer of the State, its Attorney General, had any opportunity to interpret it. The federal court then ignored the representations made by that officer during this litigation. In like manner, Nebraska's courts will be given no opportunity to define the contours of the law, although by all indications those courts would give the statute a more narrow construction than the one so eagerly adopted by the Court today. Thus the court denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute. This cannot be what *Casey* meant when it said we would be more solicitous of state attempts to vindicate interests related to abortion. *Casey* did not assume this state of affairs.

530 U.S. at 978-79 (Kennedy, J., dissenting) (citations omitted). Justice Kennedy observed that even in the facial challenge that invalidated the law, "no expert called by Dr. Carhart, and no expert testifying in favor of the procedure, had in fact performed a partial-birth abortion in his or her medical practice." *Id.* at 966.

Legislation concerning parental notification for medical procedures is an area where judicial competence is at its nadir. Were a medical researcher to prove tomorrow that having abortion shortens a woman's lifespan, legislatures could immediately hear and act on such information to ensure properly informed consent by minors considering such an operation. Courts, however, could not. It would be years, perhaps decades, before courts could assess the revelation and translate it into a meaningful right to informed consent; when a court couches its ruling in the authority of the Constitution, then it may take several generations to correct the error.

The reasons cited by the appellate court below in invalidating a state law on its face were entirely speculative and inadequate. The appellate court decision is devoid of any meaningful discussion of the alleged health conditions that would require an abortion not allowed by the statute. It merely cites a general and unsubstantiated claim of Dr. Wayne Goldner, who listed five conditions he claimed could require abortion to protect a minor's health: preeclampsia, eclampsia, premature rupture of the membranes surrounding the fetus, spontaneous chorioamnionitis, and heavy bleeding during pregnancy. Yet there is no comparison of abortion to other medical procedures that could address these illnesses, including childbirth. There is no explanation of why a minor having such serious illnesses would not be admitted to a hospital rather than operated on by an abortion clinic. The court below did not explain why a delay of a few days for notification would supposedly be detrimental to these conditions. Such unsupported medical determinations by a court is not a proper administration of the judicial function.

"Unsubstantiated and generalized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right." *Carhart v. Stenberg*, 530 U.S. at 967-68 (Kennedy, J., dissenting) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 874, 876 (1992) (joint opinion of

O'Connor, Kennedy, and Souter, JJ.)). Likewise, the "unsubstantiated and generalized" claims of undue burden here do not justify invalidation of the New Hampshire statute. The decision below must be reversed.

III. The Court Below Erred in Ignoring the Harmful Effects of Abortion, and how Parental Notification Can Provide a Minor with a Means to Learn about the Potentially Adverse Health Effects of the Procedure.

The abortion industry, like the tobacco industry, is not likely to tell the public or its customers about the harm that its product and services cause. That responsibility properly falls upon the legislature in mandating the disclosure of information and, in the case of minors, notification of parents or outright prohibition. Yet lower courts, including the appellate court here, continue to pretend that abortion causes no adverse health effects. The State of New Hampshire could rationally conclude that parents are more likely to tell their child the truth, and parental notification should be upheld on that basis. A government that can ban the sale of cigarettes to minors can surely require parental notification prior to performing an abortion on a minor.

The court below turned the issue of the health of minors on its head by implying that there are only *positive* health benefits in an abortion, and demanding a health exception on that basis, while ignoring undeniably *negative* effects of abortion. The decision also ignores, in a way that no legislature would, the obvious conflict-of-interest in allowing an abortion provider alone to talk a minor into having an abortion. New Hampshire can plainly require that a minor have access to information from her parents prior to allowing performance of the procedure. To the extent the majority opinion in *Carhart* requires a general health exception to be exercised in the sole discretion of an abortion provider profiting from the operation, *Carhart* should be flatly overruled.

Justice Kennedy decried in *Carhart* how:

> the Court awards each physician a veto power over the State's judgment that the procedures should not be performed. . . . Requiring Nebraska to defer to [one physician's] judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now [the physician] who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.

Carhart at 964-65.

The court below committed the same error, implying that a an abortionist alone be allowed to authorize an abortion for a minor, when the abortionist has a vested financial interest in performing the abortion in question. *Planned Parenthood v. Heed*, 390 F.3d 53, 59-62 (1st Cir. 2004). Such health exception defeats and cripples the statute by providing an interested party with the authority to override the State. Because "health" can be interpreted to cover almost any physical or mental condition, an abortionist can remain within the letter of the law by declaring a health need for his operation at whim.

As Judge Edith Jones wrote in reviewing a legal attempt by the original "Roe" in *Roe v. Wade* to overturn that precedent, "[h]ard and social science will of course progress even though the Supreme Court averts its eyes." *McCorvey v. Hill*, 385 F.3d 846, 852-53 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 1387 (2005) (Jones, J, concurring). Judge Jones continued:

> One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly. That the Court's constitutional

> decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication."

Id. at 853.

The court below erred in denying well-researched and reported harmful effects that abortion has for many of its subjects. Women who have a family history of breast cancer or other illnesses may be giving themselves the medical equivalent of a death sentence by agreeing to undergo an abortion. The medical literature is filled with peer-reviewed studies demonstrating how harmful abortion is to one's health. *See generally* J.M. Thorp, Jr., K.E. Hartmann, and E.M. Shadigian, "Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence," 58 OB/GYN Survey 1, at 67-79 (2003); D.C. Reardon, P.G. Ney, F.J. Scheuren, J.R. Cougle, P.K. Coleman, T. Strahan, "Deaths associated with pregnancy outcome: a record linkage study of low income women," 95 Southern Medical Journal 8, at 834-41 (August 2002) ("Higher death rates associated with abortion persist over time and across socioeconomic boundaries."); Karen Malec, "The Abortion-Breast Cancer Link: How Politics Trumped Science and Informed Consent," 8 J. Am. Physicians & Surgeons 41 (Summer 2003) (the vast majority of studies have found that abortion increases the risk of breast cancer).[3] Even abortion supporters must concede that childbirth has a protective health effect lost to women who undergo abortion, and parents are more likely to provide that information to their child than an abortionist is.

[3] http://www.jpands.org/vol8no2/malec.pdf (viewed Aug. 3, 2005).

Abortion providers predictably deny adverse health effects of abortion, despite medical research demonstrating how harmful it is. Illustrative of the denial was a much-publicized article in March 2004 in the British medical journal *The Lancet*, which concluded that "[p]regnancies that end as a spontaneous or induced abortion do not increase woman's risk of developing breast cancer." V. Beral, D. Bull, R. Doll, R. Peto, G. Reeves, "Breast cancer and abortion: collaborative reanalysis of data from 53 epidemiological studies, including 83,000 women with breast cancer from 16 countries," 363 *Lancet* 1007, 1007 (2004). Aside from criticized flaws in that survey, it did not even confront the health effect of the abortion itself. Instead, it compared [pregnancy followed by abortion] to [no pregnancy at all]. The *Lancet* article could not and did not deny that abortion increases breast cancer; instead, it merely claimed that pregnancies ending in abortion do not, taken together, increase overall breast cancer risk. But a pregnant minor needs to evaluate the effect of the abortion, not a hypothetical absence of a pregnancy in the first place. If the abortionists—or Respondents in this case—cite the *Lancet* conclusion then a judge could be easily misled, and a minor surely would be. But a parent is not so easily fooled in matters concerning her child, and legislatures can lawfully promote informed consent by requiring parental notification.

A parent might observe and restate, for example, how breast cancer rates are far lower in Western countries that prohibit abortion than those that promote it. Ireland, which virtually bans abortion, has a lifetime rate of breast cancer of only 1 in 13, nearly half the rate of 1 in 7.5 in the United States. *See* "Probability of breast cancer in American Women," National Cancer Institute (Apr. 15, 2005)[4];

[4] http://cis.nci.nih.gov/fact/5_6.htm (viewed Aug. 3, 2005).

K. O'Flaherty, R. Oakley, "Self-checks 'useless' in breast cancer fight." *Sunday Tribune* (Ireland), at 8 (Oct. 6, 2002).

In Romania, under two decades of rule by the dictator Nicolae Ceausescu, abortion was illegal and the country enjoyed one of the lowest breast cancer rates in the entire world during that time, far lower than comparable Western countries. Romania's breast cancer rate was an astounding one-sixth the rate of the United States. *See* A. Khan, "The role of fat in breast cancer," *The Independent* (May 18, 1998). But after the execution of Ceausescu on Christmas Day, 1989, Romania has taken the entirely opposite approach, embracing abortion to the point that Romania now has one of the highest abortion rates in the world. *See* N. Abdullaev, "Russians are quickest to marry and divorce," *Moscow Times* (Dec 8, 2004). One Romanian observer decried, "The liberalization of abortions in Romania in 1990, the significant increase of the number of abortions at relatively short intervals, determined a raise in the incidence of breast and uterine cervix cancer in my country." Information packet, Women's Environment and Development Organization (WEDO) World Conference on Breast Cancer (July 1997).

While there are inherent differences in breast cancer rates across ethnic populations, regions with similar ethnicity show dramatic differences in breast cancer that correlate highly to relative abortion rates. For example, the rate of breast cancer increases steadily as one travels from Ireland, where abortion is illegal, to Northern Ireland, where abortion is legal but rare, to England, where abortion is common. *See* R. O'Reilly, "New weapon in war against breast cancer," *The Press Association Limited* (Dec. 17, 1998); "With BC-Portugal abortion referendum," *Associated Press Worldstream* (June 27, 1998).

A parent might also recount how future-born children of a minor who has an abortion could suffer severe harm, and many minors might eschew abortion for that reason. "At least 49 studies have demonstrated a statistically significant

increase in premature births (PB) or low birth weight (LBW) risk in women with prior induced abortions (IAs)." Brent Rooney and Byron C. Calhoun, "Induced Abortion and Risk of Later Premature Births," 8 J. Am. Physicians & Surgeons 46 (Summer 2003).[5] Premature birth tragically causes brain damage, and an array of other severe, lifelong injuries ranging from cerebral palsy to blindness to the victim infants, and few mothers would knowingly increase the risk of that happening.[6] Researchers Rooney and Calhoun observed:

> Large studies have reported a doubling of EPB risk from two prior IAs. Women who had four or more IAs experienced, on average, nine times the risk of XPB, an increase of 800 percent. These results suggest that women contemplating IA should be informed of this potential risk to subsequent pregnancies, and that physicians should be aware of the potential liability and possible need for intensified prenatal care.

Id.

It is ironic and illogical for the court below to invalidate the New Hampshire law in the name of health, when such action will relegate many uninformed minors to a life of fear and often death caused by the effects of those abortions. It was entirely rational and constitutional for New Hampshire to give the parents of the minors information that they could act upon to persuade their own child not to have the abortion. Patients, not physicians, make the ultimate decision whether to agree to an operation or treatment, and parental notification can only increase the information for the minor to make that decision.

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[5] http://www.jpands.org/vol8no2/rooney.pdf (viewed Aug. 3, 2005).

[6] March of Dimes, *Complications of Premature Birth*, at http://www.marchofdimes.com/prematurity/5512.asp (viewed Aug. 3, 2005).

No matter how bad the health of an unemancipated minor is, or how advantageous an abortion provider may claim an abortion to be, the decision of whether to have that abortion still resides with the patient rather than the physician. The legislature can surely require that the minor's decision be fully informed, and enhance that information by requiring notification of a parent. Only then is a minor likely to hear both sides of the arguments concerning abortion, and abortionists fight such notification for the same reason that justifies giving it: many minors decide against having an abortion once they hear from their parents. Not even the wisest judge in the world can make an optimal decision based on hearing only one side to a story, and New Hampshire can ensure that unemancipated minors hear both sides of the abortion debate before electing to have one. The health of the minor, or alleged health benefits of an abortion, do not change this analysis.

The judiciary need not attempt to make a scientific determination about the adverse health effects of abortion. But this Court should clarify that the health effects of an operation are for the patient alone to decide, based on full information from whatever sources the legislature mandate. In the case of an unemancipated minor, it is eminently rational for a legislature to facilitate parental advice for the benefit of a child prior to making this decision that could alter or even end her life. To the extent that the court below was concerned with the health of the minors, that is all the more reason to respect the legislature's determination that parental notification is an essential part of the minor's informed consent to the procedure. Short of death, which is exempted from the statute, any alleged positive health effect of an abortion may be deemed by the minor and her parent to be offset by negative health effects of the abortion. The State of New Hampshire need not rely on the abortion provider to supply all the negative health effects of an abortion, any more than the public must rely on tobacco companies to inform us

of all the harm caused by cigarettes. New Hampshire's legislation is a constitutional attempt to facilitate informed consent by a minor, and should be upheld.

CONCLUSION

This Court should reverse the decision below and affirm application of the *Salerno* precedent to abortion laws. Legislative requirements of parental consent for a minor seeking an abortion are a legitimate method of protecting the welfare of the minor, and that the above reasons require that the New Hampshire statute be upheld.

Respectfully submitted,

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